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Supreme Court, U.S.
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No. _____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

PROPERTY, PARCEL OF, 194 QUAKER FARMS RD., OXFORD, CT,

Petitioner,

RICHARD J. SCIANNNA,

Claimant-Petitioner,

MONEY STORE/CONNECTICUT, INC.; JOHN SANTANGELO and BUILDERS LUMBER & SUPPLY CO., INC.,

Claimants,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does 21 U.S.C. § 881(a)(7) Violate The Fifth Amendment's Guarantee Of Due Process Of Law By Requiring A Claimant To Produce Evidence Of His Innocence Absent Any Finding Of Guilt By The Trier Of Fact?

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PETITION FOR WRIT OF CERTIORARI

The Claimant-Petitioner, Richard J. Scianna, respectfully prays that a writ of certiorari be entered to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on June 4, 1996, to determine whether a Claimant's right to due process of law is abridged in an asset forfeiture proceeding in light of this Court's recent decisions in *United States v. James Daniel Good Real Property*, 114 S.Ct. 492 (1993) and *Austin v. United States*, 113 S.Ct. 2801 (1993).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit that gave rise to this petition is published at 1996 WL 292036. A copy is reprinted here as Appendix A.

JURISDICTION

This action was tried before a jury and a judgment entered for the Government on March 17, 1995. Thereafter, the petitioner filed a timely appeal in the United States Court of Appeals for the Second Circuit. That court found in favor of the Government on June 4, 1996. Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the Second Circuit's decision.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTE INVOLVED IN THIS CASE

Title 18 U.S.C. §881(a)(7) reads as follows:

> All real property, including any right, title, and interest (including any household interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest or an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

STATEMENT OF THE CASE

A jury concluded that the petitioner had failed to prevail on his innocent ownership defense to the Government's seizure of his home. The forfeiture was initiated by the Government on August 15, 1991, when the Government filed a Verified Complaint of Forfeiture in the United States District Court for the District of Connecticut. Thereafter, the petitioner was given a notice of a probable cause hearing. That hearing never took place because a lawyer representing the petitioner, but lacking an appearance in the file, waived the hearing on October

8, 1991. A Warrant of Arrest *In Rem* was signed by a Magistrate Judge on October 11, 1996.

Jury selection took place on February 28, 1995, and trial commenced on March 1, 1996. The jury returned a verdict in favor of the Government on March 10, 1995. Judgment was entered in favor of the Government on March 17, 1995, and a timely Notice of Appeal filed on May 16, 1995.

Among the issues raised on appeal before the United States Court of Appeals for the Second Circuit was whether Congress' allocations of burdens of proof in 21 U.S.C. §881(a)(7) violated the due process clause of the Fifth Amendment to the United States Constitution. Argument took place in New York City on January 22, 1995, and the case was decided in favor of the Government on June 4, 1996.

REASONS FOR GRANTING THE WRIT

I. As The Second Circuit Court Of Appeals Noted In Its Decision In The Instant Case, This Court's Recent Decisions Regarding Asset Forfeiture Pursuant To 21 U.S.C. § 881 (a)(7) Reopen The Question Of Whether The Government's Mere Showing Of Probable Cause In Order To Obtain An In Rem Warrant Meets The Requirements Of Due Process Of Law

This Court at long last rejected the "guilty property fiction" in *Austin v United States*, 113 S.Ct. 2801, 2808-10, (1993). In so doing, the Court recognized the punitive nature of asset forfeiture. *Id.*, at 2811. *See also, United States v. Halper*, 490 U.S. 435 (1989). The Court noted that the innocent ownership defense helped to "focus . . . on

the culpability of the owner in a way that makes [the statute] look more like punishment, not less." *Id.*, at 2810-11. A case decided shortly after *Austin* held that when the Government seizes property to assert ownership, a Claimant is entitled to Fifth Amendment due process protections. *United States v. James Daniel Good Real Property*, 114 S.Ct. 492, 499-500 (1993).

The Supreme Court has yet to rule in a post-*Austin* case whether the punitive aspect of asset forfeiture renders unconstitutional a statutory scheme that requires a Claimant to prove his innocence. In fact, the Second Circuit noted in its decision in the instant case that "after *Austin*, it is now an open question whether Section 881(a)(7) warrants civil or criminal due process protections, or possibly some hybrid of the two." *United States of America v. One Parcel of Property Located at 194 Quaker Farms Road, Oxford, Connecticut, With All Appurtenances and Improvements Thereon*, 1996 WL 292036; (Appendix at App. 8).[1]

At issue in this case is whether the Government may divest a claimant of property with a mere showing of probable cause. At least one judge in the Eighth Circuit Court of Appeals found such a statute unconstitutional in

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[1] In a footnote appearing later in its decision, the Court of Appeals noted: "In *United States v. Premises and Real Property at 4492 South Livonia Road*, 889 F.2d 1258, 1270 (2d Cir. 1989), we noted that: "[a]t some point, it seems that a forfeiture would cross the line of condemning an instrumentality of crime and move into the area of punishing a defendant by depriving him of his estate. If punishment is involved, the Constitution requires many more procedural protections than are available under civil forfeiture.' *Good* and *Austin* without a doubt reopen the issue." (App. at p. 10, fn. 2)

a pre-*Austin* case. *United States v. $12,390*, 956 F.2d 801, 810 (8th Cir. 1992) (Beam, J., dissenting in part).

In the instant case, the Claimant's property was seized pursuant to a Verified Complaint of Forfeiture. Appended to that complaint were law enforcement affidavits containing references to the statements by two confidential informants. In order to establish the guilt of the owner, the jury was required neither to hear the testimony of the law enforcement agents signing the affidavits, nor the supposed testimony of confidential informants. The Claimant's home was thus seized, and he required to prove his innocence, based upon the double hearsay statements of persons never presented to the trier of fact. Certainly, this is inconsistent with this Court's recognition of the fundamental interest persons have in their home. "Individual freedom finds tangible expression in property rights. At stake . . . are the security and freedom of the home and those who take shelter within it." *United States v. James Daniel Good Real Property*, 114 S.Ct. 492, 502 (1993).

The majority rule among the District Courts, and the rule in the Second Circuit, is that hearsay is admissible in a probable cause hearing regarding an *in rem* warrant. *United States v. 4492 Livonia Rd.*, 889 F.2d 1258 (1989), *reh'g denied*, 897 F.2d 659 (2d Cir. 1990); *United States v. Daccarett*, 6 F.3d 37 (2d Cir. 1993). *But see, Jones v. Drug Enforcement Administration*, 819 F.Supp. 698 (M.D. Tenn. 1993) (nothing in the Federal Rules of Evidence suggests that Congress meant to relax evidentiary rules for the Government's benefit in forfeiture proceedings).

Once probable cause has been found, a Claimant may prove his innocent ownership, but he must do so by a preponderance of the evidence, a higher standard. *United States v. 141st Street Corp. by Hersh*, 911 F.2d 870 (2d Cir. 1990), *cert. denied*, 111 S.Ct. 1017. The petitioner contends this is fundamentally unfair.

Left unaddressed in this statutory scheme is how a Claimant should go about proving his innocent ownership. In a case in which probable cause is contested, a trial judge may begin the innocent ownership trial by simply reading to the jury the findings of fact supporting the court's conclusion that there was probable cause to believe the property should be seized. *See, United States v. One Parcel of Property Located at 121 Allen Place, Hartford, Connecticut*, 75 F.3d 118 (2d Cir. 1996) (the identical issue raised in this petition was raised in that case, but the trial court decision was reversed on other grounds).

In such a case, a Claimant is forced to rebut a finding of probable cause often based on mere hearsay. To compound difficulties, the Claimant cannot introduce hearsay of his own, but must prove his case at trial by a higher evidentiary standard than required of the Government to launch the proceedings.

In the instant case, the Claimant waived his probable cause hearing. In so doing, he did not, as the Second Circuit concluded, waive a challenge to the probable cause standard. *Quaker Farm*, at App. p. 12. The Claimant's position at trial was identical to that of a litigant who waged, and lost, a probable cause hearing. He was put to trial in a context in which a jury was told that there

was probable cause to believe that the Claimant's property was used, or intended to be used, in an illegal narcotics transaction. It then fell to the Claimant to prove his innocence by a higher evidentiary standard.

The Second Circuit concluded that this case merely presented a question of Congress' authority to shift burdens. (App. at p. 10) However, much more was at stake because the Government was never required at trial to prove guilt at all. It is as though in a criminal case a court concluded that there was probable cause to support an arrest, and the case then went to trial. At trial, the trial court informs the jury that there was probable cause to believe a crime had been committed. The state then produces no evidence, and the defendant is required to prove his innocence. Such an outcome is inconceivable. "[The] state must prove every ingredient of an offense beyond a reasonable doubt, and . . . may not shift the burden of proof to the defendant." *Sandstrom v. Montana*, 442 U.S. 510, 524 (1979). *See also, United States v. United States Gypsum Co.*, 438 U.S. 422 (1978); *Morissette v. United States*, 342 U.S. 246 (1952).

This Court has abandoned the fiction that asset forfeiture proceedings determine the guilt of the asset. As the *Austin* Court noted, "forfeiture . . . constitutes 'payment to a sovereign as punishment for some offense,' . . . and, as such, is subject to the limitations of the Eighth Amendment's Excessive Fines Clause." *Id.*, at 2812 (citation omitted). The Court noted that forfeiture punishes an owner. "If forfeiture had been understood not to punish the owner, there would have been no reason to reserve the case of a truly innocent owner. Indeed, it is only on the assumption that forfeiture serves in part to punish

that the Court's past reservation of the question makes sense." *Id.*, at 2809.

The petitioner in the instant case asks this Court to determine whether the Fifth Amendment's guarantee of due process of law protects a Claimant in a punitive context from having to prove his innocence. If asset forfeiture is punitive, then requiring a Claimant to prove his innocence is more than mere burden shifting of an affirmative defense. In the absence of any finding of guilt by a fact finder, requiring a Claimant to prove innocence transfers to him the burden of proving his innocence. That would be unacceptable in a criminal case, and this Court should find that it is unacceptable in a forfeiture proceeding which this Court has previously held to be punitive in purpose.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

JOHN R. WILLIAMS
NORMAN A. PATTIS

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 915 – August Term, 1995

(Argued: January 22, 1996 Decided: June 4, 1996)

Docket No. 95-6105

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-v.-

ONE PARCEL OF PROPERTY LOCATED AT 194 QUAKER FARMS ROAD, OXFORD, CONNECTICUT, WITH ALL APPURTENANCES AND IMPROVEMENTS THEREON,

Defendant,

RICHARD J. SCIANNA,

Claimant-Appellant,

MONEY STORE/CONNECTICUT, INC.; JOHN SANTANGELO; and BUILDERS LUMBER & SUPPLY CO., INC.,

Claimants.

Before:

WINTER, JACOBS, and PARKER,

Circuit Judges.

Appeal from a judgment of the United States District Court for the District of Connecticut (Warren W. Eginton,

Judge) forfeiting certain residential property to the government. We hold that placing the burden of proof of the affirmative defense of innocent owner on the claimant does not violate due process. We do not reach the issue of whether a forfeiture based on a showing of probable cause violates due process. We affirm.

NORMAN A. PATTIS, New Haven, Connecticut (Law Offices of John R. Williams, John R. Williams, New Haven, Connecticut, of counsel), *for Claimant-Appellant Richard J. Scianna.*

DAVID X. SULLIVAN, Assistant United States Attorney, New Haven, Connecticut (Christopher F. Droney, United States Attorney, Lisa M. Kral, Lauren M. Nash, Assistant United States Attorneys, Craig Lyle Perra, Law Student Intern, New Haven, Connecticut, of counsel), *for Plaintiff-Appellee.*

WINTER, *Circuit Judge*:

Richard J. Scianna appeals from a judgment of forfeiture after a jury trial before Judge Eginton. He brings three claims on appeal. Scianna argues first that the allocation of burdens of proof in civil forfeiture cases under 21 U.S.C. § 881(a)(7) violates due process by imposing on claimants the burden of proving an innocent owner defense. He argues second that counsel for the government engaged in prejudicial misconduct by improperly vouching for the credibility of a witness and bolstering a witness's credibility through the invocation of God and Jesus Christ. Finally, Scianna contends that

the district court erred in not granting a mistrial based on the conduct of a witness's private attorney.

We hold that it does not violate due process to place the burden of proving an innocent owner affirmative defense on the claimant. We hold that the question of whether it violates due process to limit the government's burden in securing a forfeiture to a showing of probable cause has been waived. We reject the claims of trial error and affirm.

BACKGROUND

On August 15, 1991, the government filed a complaint pursuant to 21 U.S.C. § 881(a)(7), alleging that real property located at 194 Quaker Farms Road, Oxford, Connecticut, was used or intended to be used to commit or to facilitate a violation of the Controlled Substances Act, 21 U.S.C. §§ 801 *et seq.* Scianna was record owner of the property. On September 3, 1991, the district court issued a Notice of Probable Cause Hearing. On the day before the hearing was to commence, Scianna's attorney notified the district court that Scianna would waive the probable cause hearing. On October 11, 1991, Magistrate Judge Latimer found probable cause for the seizure and issued a Warrant of Arrest *In Rem* for the property. On October 15, 1991, Scianna filed a claim to the property. After discovery and entry of a new attorney representing Scianna, a jury was selected, and the case proceeded to trial before Judge Eginton.

The probable cause hearing having been waived, the trial began with Scianna's seeking to prove an "innocent owner" defense – that is, that the property should not be

forfeited because Scianna either did not know that the property was being used for illegal drug activity or, if he did know, he had not consented to such use. *See United States v. One Parcel of Property Located at 121 Allen Place, Hartford, Connecticut*, 75 F.3d 118, 121 (2d Cir. 1996). After Scianna rested, the government, in rebuttal, elicited testimony from law enforcement officers and various alleged associates of Scianna that Scianna participated in illegal drug activity on his property, distributing both cocaine and marijuana from the property to the associates, who would thereafter deliver the cash proceeds to Scianna. At least two of the government's witnesses – William Doyle, Jr. and his son, William Doyle, III – had state narcotics charges pending against them at the time of trial. Counsel for Scianna sought to undermine the Doyles' testimony by suggesting through lengthy and aggressive cross-examination that both Doyles had been promised favorable treatment in their pending prosecutions in exchange for testimony against Scianna. During the cross-examination of the younger Doyle and in the presence of the jury, Doyle's attorney, who was present in the courtroom, interrupted the proceedings to request that he be permitted to approach the bench and to "proffer or testify or tell the Court whatever concerning the conversations with the state's attorney." Counsel for Scianna subsequently moved for a mistrial, which was denied.

In the course of seeking to undermine the credibility of Dwayne Thomas, another witness who testified that he participated in drug activity with Scianna, Scianna's counsel focused on the length of time that Thomas and his attorney had spent with government lawyers preparing to testify, presumably to suggest that three hours

could not have been spent solely on trial preparation but must also have involved the negotiation of a leniency-for-testimony bargain. Counsel for the government responded with a series of questions as follows:

> Q: Mr. Thomas, how did I instruct you to answer the questions? What did I tell you the only thing I wanted you to do was?
>
> A: Tell the truth.
>
> Q: May I approach the witness for a moment. When we've met before you have had this New Testament in your hands?
>
> Mr. Pattis: Objection. Religion can't be used.
>
> Mr. Sullivan: He wants to know what we talked about.
>
> Mr. Pattis: I'm going to object on relevance.
>
> Mr. Sullivan: He opened the door.
>
> The Court: Go ahead.
>
> Q: Did we talk about Jesus Christ?
>
> A: Yup.
>
> Q: Did we talk about God?
>
> A: Yup.
>
> Q: Did we talk about doing things the right way?
>
> A: Yes.
>
> Q: Taking responsibility for our lives?
>
> A: Yes.
>
> Q: We didn't talk about the substance of the case, did we?

A: No.

Q: We talked about the philosophies, life, God, family, isn't that correct?

A: Yes.

After the jury was excused, Scianna's counsel again requested a mistrial. This request was also denied.

DISCUSSION

Scianna argues first that the allocation of burdens of proof directed by Section 881(a)(7) violates due process. In proceedings under Section 881(a)(7), the government must first demonstrate probable cause that the property is subject to forfeiture. *See* 21 U.S.C. § 881(d); 19 U.S.C. § 1615. *See also United States v. $37,780 in United States Currency*, 920 F.2d 159, 162 (2d Cir. 1990). The burden then rests upon a claimant asserting an innocent owner defense to prove that defense by a preponderance of the evidence. *See, e.g., United States v. Milbrand*, 58 F.3d 841, 844 (2d Cir. 1995), *cert. denied*, No. 95-7859, 1996 WL 79488 (March 18, 1996).

The process generally proceeds as follows. Absent exigent circumstances, a hearing, with notice to record owners, is held before seizure. *United States v. James Daniel Good Real Property*, 114 S. Ct. 492, 498, 500-04 (1993). At this hearing, the government must show probable cause that the property has been used for narcotics trafficking. *Milbrand*, 58 F.3d at 844; *see generally, Good*, 114 S. Ct. 492. If the government meets this burden, a warrant *in rem* issues, and the property is seized. If no claimant appears, the government may dispose of the property. If a claimant

appears and asserts an innocent owner defense, the burden is on the claimant to prove that defense by a preponderance of the evidence. *Milbrand*, 58 F.3d at 844. By waiving the probable cause hearing, Scianna also waived any sufficiency challenge to the evidence underlying issuance of the warrant *in rem* and any constitutional challenge to the probable cause standard. As a result, Scianna's present challenge must be limited to the constitutionality of requiring a claimant to prove by a preponderance of the evidence the affirmative defense of innocent owner.

Scianna bases his due process challenge on the Supreme Court's decisions in *Good*, 114 S. Ct. 492, and *Austin v. United States*, 113 S. Ct. 2801 (1993). *Good* held that the protections available to forfeiture claimants were not limited to those provided by the Fourth Amendment and that, where the government seizes property not to preserve evidence but to assert ownership, Fifth Amendment due process protections also apply. 114 S. Ct. at 499-500. In *Austin*, the Court held that the Excessive Fines Clause of the Eighth Amendment is applicable to civil drug forfeitures. 113 S. Ct. at 2812. *Austin* reexamined the "guilty property fiction," *id.* at 2808-10, under which the property is viewed as the offender, and considered whether the civil drug forfeiture statute was or was not intended to punish the property's owner. The Court rejected the guilty property fiction. It stated that the historical antecedents of modern drug forfeiture statutes were at least in part punitive, and that the "legislative history of § 881 confirms the punitive nature of these [modern] provisions." *Id.* at 2811. Indeed, the Court found that the "innocent owner" defense in modern civil

drug forfeiture statutes "serve[s] to focus the provisions on the culpability of the owner in a way that makes them look more like punishment, not less." *Id.* at 2810-11. We do not regard this observation as undercut by the recent decision in *Bennis v. Michigan*, No. 94-8729, 1996 WL 88269 (March 4, 1996), which noted that forfeiture laws serve a deterrent as well as punitive purpose. *Id.* at *6.

Prior to *Austin*, we had held that the forfeiture statute's shift of the burden of proof of the innocent owner defense to the claimant did not violate due process. *See United States v. $2,500 in United States Currency*, 689 F.2d 10 (2d Cir. 1982), *cert. denied sub. nom., Aponte v. United States*, 465 U.S. 1099 (1984). In *$2,500 in U.S. Currency*, the claimant argued that the allocation of burdens was unconstitutional because it imposed "punishment" on the claimant, calling for the procedural safeguards associated with a criminal trial, including the requirement that the government prove its case beyond a reasonable doubt. *Id.* at 12. We rejected the argument. Although we acknowledged that even nominally civil statutes could be so punitive in purpose or effect as to trigger the procedural protections required in criminal cases, *id.* at 12 (quoting *United States v. Ward*, 448 U.S. 242, 248-49 (1980)), we held that the drug forfeiture statute did not rise to that level, *id.* at 12-16. In *$2,500 in U.S. Currency*, we also noted that "[h]istorically, forfeitures have always been regarded as civil." *Id.* at 14 (citing *United States v. Regan*, 232 U.S. 37 (1914)). We therefore declined to overturn the statute's allocation of burdens of proof.

Scianna maintains that because *Austin* established that seizures of real property are punitive in character, we must

reexamine the constitutionality of the statute's requirement that the claimant bear the burden of proving an innocent owner defense. We do not agree. Generally, Congress may alter the traditional allocation of the burden of proof without infringing upon the litigant's due process rights unless the statute is criminal in nature. *United States v. $250,000 in United States Currency*, 808 F.2d 895, 900 (1st Cir. 1987). Scianna is correct that after *Austin*, it is now an open question whether Section 881(a)(7) warrants civil or criminal due process protections, or possibly some hybrid of the two.[1] Nevertheless, even if criminal procedural

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[1] In making the determination in *$2,500 in U.S. Currency* that the forfeiture statute's shift of the burden of proof to the claimant did not violate due process of law, this court looked to a number of the factors suggested by the Supreme Court in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) and found, *inter alia*, that the drug forfeiture statute was not punitive in aim but remedial, 689 F.2d at 13-14, and that "the statute makes no attempt to tailor the amount of the loss to the degree of culpability, a strong indication that any punitive effect is incidental." 689 F.2d at 14. Finally, *$2,500 in U.S. Currency* found that "historically, forfeitures have always been regarded as civil." *Id.* We therefore declined to overturn the statute's burden-shifting mechanism.

Austin's holding that drug forfeiture is punitive in intent, its historical analysis, and its rejection of the government's proffered reasons why the drug forfeiture statute is remedial all directly contradict some of the holdings made by this court when it made its *Ward/Mendoza-Martinez* analysis of § 881(a)(6) (the § 881(a)(7) analogue applicable to drug money) in *$2,500*. Thus, although the *Austin* Court did not go on to engage in the full *Ward/Mendoza-Martinez* analysis of the drug forfeiture statute – it did not need to for purposes of its Excessive Fines Clause inquiry, 113 S. Ct. at 2804 – *Austin* sufficiently vitiated the rationale of *$2,500* that we regard its continued viability as an open question. *See generally* Terrence G. Reed, *On the*

standards were applied to proceedings under Section 881(a)(7), it would still be constitutional to place on the claimant the burden of proving the innocent owner defense, once we assume (as we do for this case) that the government's main case is constitutionally sufficient. We have held that it does not violate the Due Process Clause to allocate to defendants the burden of proving affirmative defenses so long as the defense does not, "in operation, negate an element of the crime which the government is required to prove." *United States v. Johnson*, 968 F.2d 208, 213-14 (2d Cir.), *cert. denied*, 506 U.S. 964 (1992); *see also Walton v. Arizona*, 497 U.S. 639, 650 (1990) (plurality opinion) ("[A] State's method of allocating the burdens of proof [may] not lessen the State's burden to prove every element of the offense charged."). Here, the government must simply establish that the property was "used . . . to commit, or to facilitate the commission of," a drug crime. 21 U.S.C. § 881(a)(7). Requiring Scianna to prove that he did not know or consent to the particular use of the property does not require him to negate any element of the government's case.

Moreover, those who assert the innocent owner defense have unique access to evidence regarding such claims. They know precisely what information was brought to their attention and why facts of which owners are generally aware were unknown to them. If knowledge of drug transactions on the premises is conceded, they also know precisely what steps they took to prevent use

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Importance of Being Civil: Constitutional Limitations on Civil Forfeiture, 39 N.Y.L. Sch. L. Rev. 255 (1994) (arguing that proper *Mendoza-Martinez* inquiry identifies civil drug forfeiture statute as penal with respect to non-contraband property).

of the premises for drug trafficking. *See 121 Allen Place*, 75 F.3d at 121-22. Burden-shifting where one party has superior access to evidence on a particular issue is a common feature of our law. *See* John W. Strong et al., *McCormick on Evidence* § 337, at 570 94th ed. 1992).

We do note that while Congress may shift the burden of proof of an affirmative defense to a civil forfeiture claimant, *Good* and *Austin* reopen the question of whether the quantum of evidence the government needs to show in order to obtain a warrant *in rem* allowing seizure – probable cause – suffices to meet the requirements of due process.[2] As noted above, *$2,500 in U.S. Currency*, which

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[2] Only one case in this circuit explicitly discusses the adequacy of the evidentiary burdens of the civil drug forfeiture statute. It states:

> [Appellant] also suggests in passing that the burden-shifting procedure of the statutory forfeiture scheme is unconstitutional when applied to the proceeds of drug activity rather than to property that is itself contraband. His argument seems to be that real property is "somewhat sacred", and so when real property constitutes the "proceeds" to be forfeited, a higher standard than that of probable cause should be applied. We find nothing unconstitutional in congress's allocation of the burdens of proof in forfeiture cases, and therefore also reject this argument.

United States v. 228 Acres of Land and Dwelling Located on Whites Hill Road, 916 F.2d 808, 814 (2d Cir. 1990), *cert. denied sub nom., Moreno v. United States Drug Enforcement Admin.*, 498 U.S. 1091 (1991). However, this decision was rendered before the Supreme Court decided *Good* and *Austin*.

The government points out that we have continued to apply the statutory forfeiture framework in post-*Austin/Good* cases,

held that the "beyond a reasonable doubt" standard of *In re Winship*, 397 U.S. 358 (1970), does not apply to civil forfeitures under the drug forfeiture statute, 689 F.2d at 12, has been opened for reexamination by *Austin*. Independent of this question, we also note that it is an open issue "whether the due process clause requires the government to sustain a burden falling between the extremes of probable cause and proof beyond a reasonable doubt" before a seizure is made and a claimant is put to proof of the innocent owner defense.[3] Peter Petrou, *Note: Due*

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see, e.g., Milbrand, 58 F.3d at 844. We agree but also recognize that the sum total of our pronouncements on the issue since *Austin* and *Good* has been a recognition that "the Constitutionality of Congress's allocation of the burdens of proof in forfeiture cases has been upheld," *United States v. Daccarett*, 6 F.3d 37, 57 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1294 (1994), with a citation to the page of *Whites Hill Road* quoted above. In *United States v. Premises and Real Property at 4492 South Livonia Road*, 889 F.2d 1258, 1270 (2d Cir.1989), we noted that: "[a]t some point, it seems that a forfeiture would cross the line of condemning an instrumentality of crime and move into the area of punishing a defendant by depriving him of his estate. If punishment is involved, the Constitution requires many more procedural protections than are available under civil forfeiture." *Good* and *Austin* without a doubt reopen the issue.

[3] Only one Court of Appeals opinion, a dissent, conducted a full *Mathews v. Eldridge*, analysis of the civil drug forfeiture statute's probable cause requirement. That opinion, authored by Judge Beam of the Eighth Circuit, concluded that the fact that "the government may divest claimant of title with a mere probable cause showing, often established through the use of inadmissible evidence . . . [is] a denial of due process." *United States v. $12,390.00*, 956 F.2d 801, 810 (8th Cir. 1992) (Beam, J., dissenting in part).

Process Implications of Shifting the Burden of Proof in Forfeiture Proceedings Arising out of Illegal Drug Transactions, 1984 Duke L.J. 822, 827 (1984). We, of course, do not reach that issue in this case because of Scianna's waiver discussed above.

We turn next to Scianna's attorney misconduct claims.[4] First, Scianna argues that the government's trial attorney impermissibly injected himself into the proceedings, bolstering a witness's credibility. We find no such misconduct in the portions of the trial transcript quoted by Scianna. Furthermore, to the extent that Scianna's counsel's cross- and recross-examinations sought to accuse the government of witness-coaching or making a deal for testimony, he invited the exchange: "Q: What did I tell you the only thing I wanted you to do was? A: Tell the truth." *See United States v. Young*, 470 U.S. 1, 12 (1985) (discussing invited error).

Scianna's second claim of misconduct concerns the government's invocation of God and Jesus Christ during the questioning of Dwayne Thomas. Here, too, Scianna's

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[4] We note that this proceeding is at least nominally a civil case, calling into question the extent to which we should apply the standards governing prosecutorial conduct. However, the government appears to concede that "[s]tandards of conduct for government attorneys at trial should be applied uniformly in both civil and criminal cases," although it suggests that we keep in mind "obvious distinctions between civil *in rem* asset forfeitures [sic] proceedings and criminal *in personam* actions." Our resolution of this issue makes it unnecessary to discuss what differences, if any, might apply to our treatment of government misconduct in criminal cases, on the one hand, and civil forfeiture proceedings, on the other.

counsel invited the government's line of questioning. By hammering home the length of time that Thomas and his attorney spent with prosecutors in an attempt to suggest that they were in fact negotiating a deal for immunity, Scianna's counsel opened the door to questions eliciting the actual discussions and events transpiring during that time.

Finally, we turn to the actions of the attorney for the younger Doyle in offering before the jury to testify concerning any conversation between his client and the state's attorney. Scianna's suggestion that this behavior warranted a mistrial is without merit. Although this interruption was certainly a bizarre event, we perceive no prejudice to Scianna that would alter the outcome. The only prejudice claimed at trial was that the jury might draw a negative inference from the fact that the attorney would not be called by the defense. Refusing a mistrial on this claim is not an abuse of discretion.

We therefore affirm.